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3 May 2024

Elizabeth Johnstone
Independent Chair
ASX Corporate Governance Council

By electronic submission

Dear Elizabeth

Draft 5th Edition of the Corporate Governance Principles and Recommendations (CGPR)

1. Thank you for the opportunity to make this submission in relation to the draft 5th edition. You met with me recently in my capacity as the Chair of WiseTech Global Limited (ASX:WTC). I am also the Chair of the Australian Ballet, and a non-executive director of Aussie Broadband Limited (ASX: ABB), Australia Post, and a number of other companies. As an Adjunct Professor at Monash University, for the last five years I have taught corporate governance in the MBA and Global Executive MBA programmes. I sit on the AICD Corporate Governance Committee. I am making this submission in my personal capacity.

Introduction

2. The CGPR play an important role in Australia's corporate governance framework, obviously for listed companies but also more generally in corporate Australia, since they are often held out as something of a "best practice" view of corporate governance in Australia. Those knowledgeable in this field understand that Australia's approach to corporate governance has certain similarities with, but also quite distinct differences from, other mature developed market economies across the OECD. It is appropriate, therefore, in updating the CGPR that changes are made in a highly considered way. There is no single, unified view of what constitutes corporate governance best practice; and "more" is certainly not necessarily "better".

3. The CGPR have become very detailed: can it truly be said that the "recommendations" (and their notes) do no more than is absolutely necessary to enhance a reader's understanding of the "principles"? I would suggest that when this ceases to be principle-based regulation, perhaps the description of the CGPR should be reconsidered.

4. I am aware that some parties believe that separating the notes from the recommendations may improve the draft 5th edition, presentationally and apparently substantively (because it will make it clear that the notes do not form part of the recommendations). While acknowledging this last point as important, an alternative approach might be to edit the notes more assiduously to remove extraneous commentary. I would be concerned if separating the notes led us to a "comfort zone" where notes could grow ever longer, especially when some of the notes purport to articulate expectations about good practice.

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5. I am reminded that many companies over the last decade or two have suffered reputational damage, if not enforcement activity, as a result of poor corporate governance. If they were publicly listed on the ASX, these companies would have produced annual corporate governance statements, and many self-assessed as complying with the CGPR. What inference can we draw from this? Certainly not that more detail will inevitably improve the situation. Many governance failures are ultimately cultural failures, and it is difficult to regulate for cultural strength and ethical awareness. Kenneth Hayne AC KC made a related point in his Royal Commission Report when he emphasised and described six "norms of conduct"; i.e. "fundamental precepts…well-established, widely accepted, and easily understood".[1] The further we depart from "fundamental precepts", the greater the complexity and compliance burden on companies. For this to be justifiable, it is important to believe that better outcomes will follow.

6. I support all changes designed to reduce the overlap between the CGPR and the Corporations Act; and would encourage you to extend this thinking to include overlap with the Listing Rules and their Guidance Notes.[2]

7. I have generally limited my comments to the proposed changes from the 4th edition.

Comments

8. As you know, corporate governance in the anglosphere is built on a balance between three foundational theories (agency, stewardship and stakeholder), where there are implicit tensions and matters of emphasis between them. By my count, there are 31 references to stakeholders in the draft 5th edition, and not a single reference to the concept of stewardship. The draft 5th edition goes so far as to list types of stakeholders.[3] It is uncontroversial that Boards must attend to the interests of a wide number of stakeholders, in addition to shareholders' interests (and usually complementary to them). There is some merit in leaving companies to choose how they explain their approach to broader stakeholder considerations. This is the approach in the UK, where the Corporate Governance Code simply requires directors to describe in a company's Annual Report how stakeholders' interests have been considered in board discussions and decision-making.

9. The commentary to recommendation 1.1 states that "generally, the board of a listed entity should be responsible under its charter for **setting** its strategic objectives". In practice, setting a company's strategy (including its strategic objectives) is a collaborative process between the Board and management, and I believe this represents best practice. Any notion that directors can descend from a proverbial mountaintop with strategic objectives for management to

[1] Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, pages 8-9.
[2] The CGPR's approach to continuous disclosure may be an example of where overlap could be further reduced, and assiduous editing could be employed. E.g. the statement that disclosed "information should be accurate complete and not misleading" is unnecessary.
[3] Recommendation 1.1.

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implement is outdated. In saying this, I note the use of the word "responsible", but even that I believe belies reality. Boards are responsible for **approving** strategic objectives, but the process of setting them is a shared one, with management.

10. The commentary to recommendation 1.1 also states that "where some responsibilities are delegated to a board committee, the board retains the ultimate oversight in respect of those delegated matters". This is a new addition to the 5th edition. That directors cannot delegate their duties is uncontroversial: the wording here could be improved by saying that "the board retains ultimate **responsibility**" (not "oversight"). Some Boards may elect to delegate responsibilities to a Board Committee as an efficient way to do their work. In that situation, I suggest that directors should be able to trust and rely on their colleagues' judgement, without further oversight, but while retaining ultimate responsibility.

11. The inclusion of a "40:40:20" target will, no doubt, attract comment from many interested parties. Having a diverse Board is one of the best ways to enable good decision-making on complex issues, informed by a variety of backgrounds, life experiences, and training. Gender is a crucial element of diversity, but it is not the only relevant dimension. I work with several organisations where inclusion is a key priority (born from the belief that diversity follows inclusion); and this belief has activated the recruitment of cognitively diverse people, people with physical impairments, as well as people from diverse cultural heritages. The passing reference in recommendation 2.3 to "considering other relevant diversity characteristics" does not, in my opinion, give sufficient weight to this. I would imagine that most professional directors are well aware of the ACSI and HESTA advocacy for "40:40:20" and, for most, it will be one of the considerations to balance when striving to create a high-performance board. Whether "40:40:20" should be granted the standing of an "if not, why not" recommendation, when so many other inclusion and diversity considerations receive much less attention, must be actively debated. Now that Australia has achieved a 36.6% female gender composition in the ASX300,[4] I would respectfully suggest that balancing Board composition and diversity considerations could be left to directors, with a recommendation that boards disclose their inclusion and diversity considerations in the corporate governance statement.

12. The commentary to recommendation 2.2 states that "Better practice is to include information on the skills of individual directors". The draft does not disclose the basis for this assertion. Given that boards operate principally as a collective, and high-performance boards are a consequence of individuals working effectively with their colleagues in the best interests of the company, the focus on individual skills seems over-emphasised. Collective skills and experience matter for good boards; how the collective dynamic works in practice is rarely about any individual's skills and far more about the group. Consideration should also be given to whether an emphasis on individual skills may work against the inclusion and diversity objectives discussed above, since disclosure could potentially discourage those from less traditional pathways to seek consideration.

13. In recommendation 3.2, the proposal to require disclosure of outcomes during the last reporting period for material breaches of a code of conduct (on a de-identified basis) lacks nuance.

[4] AICD, Gender Diversity Progress Report, March 2023 to June 2023.

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Promoting a "SpeakUp" culture is clearly extremely important, and appropriate. Having training to support this is also crucial, and so is using fair, impartial and effective investigatory processes. It is appropriate to require prompt reporting of material breaches to the Board in some form. It is also appropriate that Boards should ensure that appropriate consequences follow an established material breach. It does not follow, however, that a specific disclosure requirement is needed. The system of corporate governance in Australia is built on the foundation principle that director's have a responsibility to exercise skilled judgement in relation to complex matters. In my experience, sometimes transparency of the kind proposed is appropriate, and sometimes (having regard to the circumstances of all affected) it is not. There is no evidence that additional disclosure will enhance the responsibility of directors to address such matters effectively. I am aware that some large listed companies, particularly in the financial services sector, have elected to publish information about material Code of Conduct breaches voluntarily. This supports the notion that directors are well-placed to consider appropriate policies based on their company's individual circumstances. I also wonder if the proposed disclosure regime could create perverse incentives (by creating a "chilling effect"; a reluctance to investigate or take action that an entity may be embarrassed to disclose). My comments above are equally applicable to to proposed disclosure of clawback actions.

14. Given the desirability of keeping the CGPR as short and simple as possible, I would encourage the Council to review the proposed draft 5th edition through the lens of removing unnecessary detail. There are a number of areas where comments are provided that specify/ describe matters that should ordinarily (and naturally) follow from diligent and thoughtful governance practice. The statements about how to engage with investors (commentary to recommendation 6.2) might fairly be seen as one example; the suggestion that boards should consider crisis management and business continuity practices (addition to recommendation 7.2) would be another. The suggestion that companies might publishing guidelines about what constitutes responsible business conduct (in addition to purpose and values statements, and a Code of Conduct) might be another.

I hope these comments will be useful to your deliberations. Please feel free to contact me as required.

Yours sincerely

(Dr) Richard Dammery